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In the Supreme Court of the United States

OCTOBER TERM, 1980

VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether respondents have standing to sue in their capacity as citizens to challenge actions of the federal government alleged to constitute an establishment of

*The United States and the Department of Health, Education, and Welfare were defendants in the district court and appellees in the court of appeals. Petitioner has erroneously aligned the federal parties as petitioners in the caption of its petition. Under Rule 19.6 of the Rules of this Court, all parties other than the petitioners are respondents.

Pursuant to the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, the Department of Health, Education, and Welfare was abolished. Section 505(e) of the Act, 93 Stat. 691, provides that suits pending against HEW on its effective date shall

religion when respondents cannot allege injury to themselves as taxpayers.

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survive with the Secretary of Education substituted as a party if, as here, the suit concerns governmental functions transferred to the Department of Education.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41) is reported at 619 F. 2d 252. The order of the district court (Pet. App. A42-A44) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A45-A46) was entered on April 8, 1980. A petition for rehearing was denied on June 3, 1980 (Pet. App. A47-A48). The petition for a writ of certiorari was filed on August 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents, an organization dedicated to the principle of separation of church and state and several of its members, challenge the transfer by the Department of Health, Education, and Welfare to petitioner Valley Forge Christian College of certain surplus federal land, buildings and equipment. The property, formerly part of the Valley Forge Army Hospital, was deeded to the college in return for its commitment to use the property in a manner beneficial to the public. The government conveyed the property pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 848(k)(1).

Respondents brought suit in the United States District Court for the Eastern District of Pennsylvania, alleging that the conveyance of valuable federal property to a church-affiliated school violated the Establishment Clause of the First Amendment.[1] The district court dismissed the

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[1] The court of appeals stated that the college is "admittedly sectarian" (Pet. App. A3). However, while there was some discovery in the district court on this question, neither the college nor the government conceded that the college is pervasively sectarian. This

suit for lack of standing to sue, reasoning that, since the school received surplus property rather than a grant from current appropriations, respondents could not show the necessary nexus between the challenged action and their economic interest as taxpayers to meet the test of *Flast* v. *Cohen*, 392 U.S. 83 (1968) (Pet. App. A42-A44).

The court of appeals reversed (Pet. App. A1-A41). The court agreed with the government that respondents do not have standing to sue as "taxpayers," since the property here involved is "surplus" property and is not the object of continuing appropriations by Congress. Hence, its disposition could not result in any discernible pocket-book injury to taxpayers. Nonetheless, the court of appeals found that respondents had standing to sue based on their personal rights under the Establishment Clause of the First Amendment. The Establishment Clause, in the court's view, affords each citizen a protected right to be free of governmentally established religion and the religious pressures that may result from establishment of religion. The court perceived a religious liberty value in the establishment clause—establishment of religion "injures [respondents'] individual and personal constitutional right of religious liberty and separation of church and state" (Pet. App. A27).

Judge Rosenn, in a concurring opinion, concluded that respondents "have standing because they possess the necessary adversity of interest and, as a practical matter, no one is better suited to bring this lawsuit and thus vindicate the freedoms embodied in the Establishment Clause" (Pet. App. A30-A31).

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factual issue has not yet been fully explored because the district court granted the government's motion to dismiss the complaint and the college's motion for summary judgment. Those rulings were based solely on lack of standing to sue (Pet. App. A43-A44).

Judge Weis, in dissent, concluded that respondents did not have a concrete interest in the controversy and that a "generalized grievance brought by concerned citizens seeking to enforce a particular constitutional guarantee has been deemed too abstract to satisfy the injury in fact component of standing" (Pet. App. A36). He observed that the majority's ruling establishes new law, extending beyond this Court's prior standing decisions (*id.* at A41).

ARGUMENT

The decision of the court of appeals addresses a question under the doctrine of standing to sue that no court previously has faced. Accordingly, the decision does not conflict with any decision of this Court or any other court of appeals. In addition, the decision is interlocutory, leaving open all issues of liability and relief that may arise in this litigation. Moreover, it is not possible to determine at this time whether the decision will have a significant effect on Establishment Clause litigation in general. Review by this Court of the question decided by the court of appeals is therefore unwarranted at this time.

1. The decision of the court of appeals addresses a difficult and novel question that was raised but not decided in *Flast* v. *Cohen*, 392 U.S. 83 (1968)—whether "the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for" standing to sue. 392 U.S. at 115-116 (Fortas, J., concurring). That issue was not reached in *Flast* because the Court was able to predicate standing to sue on the plaintiffs' taxpayer status.[2]

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[2]The Court recognized standing to sue under the following circumstances (392 U.S. at 102-103):

> First, the taxpayer must establish a logical nexus between that status and the type of legislative enactment attacked. Thus, a

Normally, in cases brought under the Establishment Clause, standing to sue exists either because taxpayer funds are being spent to aid religion (as alleged in *Flast*) or because the challenged actions of the government impinge directly on the interests of the particular plaintiff.[3] However, this Court's decisions also confirm that plaintiffs may not bring suit solely in their capacity as "citizens" to litigate generalized complaints that the federal government is not complying with constitutional standards. See *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (challenge to members of Congress holding reserve commissions); *United States* v. *Richardson*, 418 U.S. 166 (1974) (challenge to the CIA's secret budget).

> taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. * * * Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

[3]Thus, in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), this Court found that school children and their parents had standing to complain of the practice of conducting prayers in public schools. The Court stated (*id.* at 224 n.9):

> It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. * * * The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.

As both the district court and the court of appeals agreed, respondents do not meet the *Flast* test for taxpayer standing because they do not challenge a taxing or spending program under Art. I, § 8 of the Constitution. Rather, they challenge a governmental transfer of surplus property to a religiously-oriented college, which occurred after the government obtained full use of the property. The impact on a taxpayer of one method of disposition of surplus federal property rather than another is indirect and speculative. Nonetheless, we recognize that the constitutional claims made in this case differ in some respects from those in *Richardson* and *Reservists Committee*, which involved claims of violations of constitutional provisions concerning the internal organization and processes of government rather than violations of a provision of the Bill of Rights. Thus, plaintiffs in suits such as this may argue that, while a citizen has only an abstract interest in good government that is threatened by a violation of the housekeeping provisions, any citizen is more significantly affected in his individual capacity when the government takes substantial action to establish religion.

Resolution of the question presented in this case calls for a reexamination of the doctrine of standing to sue in the context of the Establishment Clause. There is no need for this Court to undertake that difficult task on the basis of an interlocutory decision of a single court of appeals.[4] Moreover, in view of the fact that many Establishment Clause suits already may proceed under the principles

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[4] *American Jewish Congress* v. *Vance*, 575 F. 2d 939 (D.C. Cir. 1978), relied on by petitioner, denied standing to sue to a plaintiff organization challenging discrimination against its members. The D.C. Circuit did not consider the question of standing to sue left open in *Flast* and resolved in the present case.

established by this Court in *Flast* and in *Schempp*, the practical consequences of the decision of the court of appeals in this case may be limited. Review of the issue presented in this case should therefore await further development of the case law in this area.

2. We recognize that the decision of the court of appeals exposes petitioner to the hardship of defending this suit on the merits and opposing any remedies that may ultimately be ordered after trial. Should the college suffer an adverse judgment on the merits, a petition for certiorari may be filed following appellate review. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). At trial, of course, the college may contend that the transfer of property did not violate the Constitution, or if it did, that such a ruling should not be given retroactive effect. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The college may also contend that principles of equity forbid a decree that would compel it to return the property, in view of its good faith and justifiable reliance on the grant from the federal government and its substantial investment of money in the property. See Pet. 5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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